BEFORE

THE PUBLIC SERVICE COMMISSION

OF SOUTH CAROLINA

DOCKET NO. 2014-346/WS – ORDER NO. 2021-__

_____, 2021

IN RE: Application of Daufuskie Island Utility Company, Inc. for Approval of an Increase for Water and Sewer Rates, Terms and Conditions	)	**ORDER DENYING REQUEST FOR REPARATIONS**

I. INTRODUCTION

This matter is before the Public Service Commission of South Carolina (the "Commission") on the Request for Reparations ("Request") filed by Daufuskie Island Utility Company, Inc. ("DIUC" or the "Applicant").

II. BACKGROUND

1. On June 9, 2015, DIUC filed an application seeking approval of a new schedule of rates and charges for water and sewer service provided to DIUC's customers within its authorized service area ("Proposed Rates"), and seeking additional annual revenues for combined operations of $1,182,301. (Application Schedule A-4, Pro Forma Proposed Rates, Total Revenues).

2. On December 8, 2015, the Commission issued Order No. 2015-846 ruling on DIUC's Application. Commission Order 2015-846 approved rates ("Initially Approved Rates") allowing DIUC to earn additional annual revenue of $462,798.

3. DIUC filed a Petition for Reconsideration and/or Rehearing of Order No. 2015-846. On February 25, 2016, the Commission issued Order No. 2016-156 denying DIUC's Petition for Reconsideration and/or Rehearing.

4. On March 22, 2016, DIUC filed and served its Notice of Appeal seeking review of Commission Orders 2015-846 and 2016-50 the ("Orders").

6. On January 20, 2016, DIUC filed a Petition for Bond Approval in which it notified the Commission that, under S.C. Code Ann. § 58-5-240(D), DIUC intended to put its Proposed Rates into effect under surety bond during the pendency of an appeal.

7. On March 1, 2016, the Commission issued Order No. 2016-156 approving the surety bond proposed by DIUC ($787,867), effective July 1, 2016, for a period of one year. On June 30, 2017, the Commission issued Order No. 2017-402(A) extending DIUC's surety bond for an additional six months.

8. On July 1, 2016, and pursuant to S.C. Code § 58-5-240(D), the Company began collecting its Proposed Rates under bond.

9. On July 26, 2017, the South Carolina Supreme Court reversed the Orders, and remanded the case to the Commission for a *de novo* hearing. *Daufuskie Island Utility Company v. S.C. Office of Regulatory Staff*, 420 S.C. 305, 803 S.E.2d 280 (2017) ("*DIUC I*").

10. On December 6th and 7th of 2017, the Commission conducted a *de novo* Rehearing of DIUC's Application.

11. On January 31, 2018, and following the Rehearing, the Commission issued Order No. 2018-68. On February 20, 2018, DIUC filed a Petition for Reconsideration and/or Rehearing

of Order No. 2018-68. On May 16, 2018, the Commission issued Order No. 2018-346 denying DIUC's Petition for Reconsideration and/or Rehearing.

12. On June 13, 2018, DIUC filed and served its Notice of Appeal seeking review of Order No. 2018-68 and Order No. 2018-346 (the "Orders on Rehearing").

13. The Orders on Rehearing approved rates ("Subsequently Approved Rates") allowing DIUC to earn additional annual revenue of $950,166. Per S.C. Code Ann. § 58-5-240(D), Order No. 2018-68 required DIUC to refund to its customers the difference between the revenue collected by DIUC under the Proposed Rates and the revenue approved by the Orders on Rehearing resulting in the Subsequently Approved Rates.

13. Following the Rehearing, DIUC did not exercise its rights under S.C. Code Ann. § 58-5-240(D) to put its Proposed Rates into effect under bond during its appeal of the Orders on Rehearing, but instead implemented the Subsequently Approved Rates.

14. On July 24, 2019, the South Carolina Supreme Court reversed the Orders on Rehearing, and again remanded the case to the Commission for another *de novo* hearing. *Daufuskie Island Utility Company v. S.C. Office of Regulatory Staff*, 420 S.C. 305, 803 S.E.2d 280 (2017) ("*DIUC II*").

15. On February 25, 2021, the Commission held a virtual hearing, during which the parties submitted a Settlement Agreement, and the Commission made certain Settlement Testimony a part of the record.

16. On March 30, 2021, the Commission issued Order No. 2021-132 ("Order on Second Rehearing") approving rates effective March 1, 2021 ("Current Rates").

17. Therefore, because of the Orders on Rehearing and the operation of S.C. Code Ann. Section 58-5-240(D), DIUC collected the Subsequently Approved Rates from its

customers beginning on June 1, 2016 and continuing until March 1, 2021 (the date the Current Rates became effective pursuant to the Order on Second Rehearing). To clarify, DIUC never collected the Initially Approved Rates, because DIUC put the Proposed Rates into effect under bond.

III. ANALYSIS AND CONCLUSIONS OF LAW

A. DIUC requests that the Commission implement the Current Rates retroactively.

The Request seeks to have the Current Rates apply going backwards:

> DIUC asserts the temporary rates permitted by Order 2015-846's rate increase of 43%, which was mitigated but not corrected by Order 2018-68's further changes permitting a rate increase of 88.5%, were confiscatory. DIUC seeks reparations to recoup through a surcharge its shortfall in revenues and return with interest accumulating until the surcharge becomes effective, back to its January 2018 billing for service provided for the last quarter of 2017, until its first billing following a final decision on the recoupment issue. DIUC also seeks reparations to recoup through a surcharge the credit/refund made in its January 2018 billing for the difference between the 88.5% increase and the 108.9% increase that had been in effect during the first appeal with interest accumulating until the surcharge becomes effective.

Order on Second Rehearing, Exhibit 1, paragraph 8.

The question before the Commission, then, is whether granting the Request is allowable under South Carolina law, or illegal "retroactive ratemaking."

B. Ratemaking in South Carolina is Prospective.

The parties agree that the Current Rates approved by the Order on Second Rehearing are prospective. *See* Second Order on Rehearing, Exhibit 1, at Paragraph 2: ("These rates and charges become effective upon Order of the PSC accepting this Settlement Agreement and may be first billed by DIUC to its customers in the first bill issued by DIUC thereafter.") The

prospective nature of the Current Rates follows the general principle that rates approved by the Commission following a water or sewer rate case conducted pursuant to S.C. Code Ann. Section 58-5-240 are prospective. Ratemaking is a prospective rather than a retroactive process. *Porter v. SCPSC*, 328 S.C. 222, 493 S.E.2d 92 (1997) ("*Porter*"). And each previous Order approving rates issued in this Docket (the Orders and the Orders on Rehearing) adjusted rates (approved rates that replaced existing rates with new rates) *going forward*, except (as described herein) when S.C. Code Ann. § 58-5-240(D) applied.

C. The Commission cannot adjust "lawfully approved" rates retroactively

1. *The Commission possesses no implied power to adjust lawfully approved rates retroactively*

DIUC argues that the "reparations DIUC seeks are within the express and implied powers of this Commission and, if there is a question of authority, the health and welfare at stake with the Commission's duties justifies liberal construction so as to view implied powers broadly". DIUC Reply, p. 10. DIUC references S.C. Code Ann. § 58-5-210, and cites *Beard-Laney, Inc. v. Darby*, 213 S.C. 380, 49 S.E.2d 564 (1948). DIUC argues that the Commission has the authority to grant the Request based on the implied powers found in S.C. Code Ann. § 58-5-210 and the general authority of the Commission.

The Commission only possesses that authority given to it by the General Assembly. *South Carolina Cable TV Assoc. v. PSC*, 313 S.E. 48, 437 S.E.2d 38 (1993). More particularly, the Commission "simply does not have any implied power to award refunds in the nature of reparations for past rates or charges; such power must be expressly conferred by statute." *SCE&G v. SCPSC*, 275 S.C. 487, 490, 272 S.E.2d 793, 795 (1980) ('*SCE&G*"). Consequently, any power the Commission possesses to grant reparations for past rates or charges must be

expressly set out in a particular statute, and cannot be implied from the Commission's general powers to regulate utilities like DIUC. Likewise, that power cannot be implied from case law issued in other jurisdictions.

As a result, the authority granted to the Commission in S.C. Code Ann. § 58-5-210 does not include the power to award reparations for past rates or charges:

> The Public Service Commission is hereby, to the extent granted, vested with power and jurisdiction to supervise and regulate the rates and service of every public utility in this State, together with the power, after hearing, to ascertain and fix such just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed, observed and followed by every public utility in this State and the State hereby asserts its rights to regulate the rates and services of every "public utility" as herein defined.

There is no express language granting that power in S.C. Code Ann. § 58-5-210, and therefore that power cannot be implied. In *SCE&G* the S.C. Supreme Court reversed a circuit court order holding that S.C. Code Ann. § 58-27-140 (functionally identical to S.C. Code Ann. § 58-5-210) gave the Commission the implied power to require SCE&G to make a general refund to its customers. Likewise, the myriad of cases from other jurisdictions cited by DIUC simply are not applicable here, and could not support granting DIUC's Request. No statute in Title 58 implicitly grants the power to award reparations in connection with past rates.

Those cases cited by DIUC do not change or affect our conclusion. *Beard-Laney, Inc. v. Darby*, 213 S.C. 380, 49 S.E.2d 564 (1948), which considered the Commission's power to approve a transfer of a transportation franchise (and not the Commission's authority to adjust rates retroactively), references the fact that various statutes "may contain express prohibitions" that are "limiting factors" on any exercise of the Commission's powers. 213 S.C. 398, 49 S.E.2d 567. As described herein S.C. Code Ann. § 58-5-240(D) and S.C. Code Ann. § 58-5-290 contain

"express prohibitions" on adjusting rates retroactively. The South Carolina Supreme Court has confirmed those prohibitions, in *Porter* and *SCE&G*.

The S.C. Supreme Court's decision in *Carolina Water Service v. SCPSC*, 272 S.C. 61, 248 S.E.2d 924 (1978) does not change the analysis above, or support the proposition either that the *Carolina Water Service* case or any case supports the "broad view of its [the Commission's] implied authority" espoused by DIUC. DIUC Reply Brief, p. 10. The *Carolina Water Service* decision (determining that S.C. Code Ann. § 58-5-290 gives the Commission the authority to determine rates for tap fees or contributions in aid of construction) does not touch on the express language of S.C. Code Ann. § 58-5-290 or provide any analysis at odds with *Porter* or *SCE&G*.

2. *S.C. Code Ann. § 58-5-240(D) and S.C. Code Ann. § 58-5-290 prohibit the Commission from adjusting "lawfully approved rates" retroactively.*

Outside of the prospective rates resulting from a rate case, the General Assembly has empowered the Commission to adjust water and wastewater utility rates in two specific instances. First, under S.C. Code Ann. § 58-5-240(D), the Commission will order a utility to refund the difference between rates put into effect under bond and those approved by the Commission, plus interest. Second, the Commission may correct rates under S.C. Code Ann. § 58-5-290.

a) S.C. Code Ann. § 58-5-240(D)

S.C. Code Ann. § 58-5-240(D) allows a utility to put its proposed rates into effect under bond during the pendency of an appeal and subsequent remand:

> If the Commission rules and issues its order within the time aforesaid, and the utility shall appeal from the order, by filing with the Commission a petition for

> rehearing, the utility may put the rates requested in its schedule into effect under bond only during the appeal and until final disposition of the case. Such bond must be in a reasonable amount approved by the Commission, with sureties approved by the Commission, conditioned upon the refund, in a manner to be prescribed by order of the Commission, to the persons, corporations, or municipalities, respectively, entitled to the amount of the excess, if the rate or rates put into effect are finally determined to be excessive; or there may be substituted for the bond other arrangements satisfactory to the Commission for the protection of parties interested. During any period in which a utility shall charge increased rates under bond, it shall provide records or other evidence of payments made by its subscribers or patrons under the rate or rates which the utility has put into operation in excess of the rate or rates in effect immediately prior to the filing of the schedule.
>
> All increases in rates put into effect under the provisions of this section which are not approved and for which a refund is required shall bear interest at a rate of twelve percent per annum.
>
> The interest shall commence on the date the disallowed increase is paid and continue until the date the refund is made.
>
> In all cases in which a refund is due, the Commission shall order a total refund of the difference between the amount collected under bond and the amount finally approved.

That process potentially involves rates being set looking back where (as occurred following *DIUC I*) the final rates approved by the Commission following an appeal (the Subsequently Approved Rates) are lower than the Proposed Rates put "into effect under bond only during the appeal and until prior disposition of the case . . . ." S.C. Code Ann. Section 58-5-240(D) requires that the utility refund the difference with interest.

S.C. Code § 58-5-240(D) further demonstrates the prospective nature of ratemaking in South Carolina, by giving a utility like DIUC the ability to put its proposed rates (which are not "lawful" rates approved by the Commission) into effect during an appeal and until the Commission determines appropriate rates (the "lawfully approved" rates) following the appeal.

A utility that does not utilize the bonding process set out in S.C. Code Ann. § 58-5-240(D), cannot seek to apply "lawfully approved" rates retroactively.

b) S.C. Code Ann. § 58-5-290.

S.C. Code Ann. Section 58-5-290 expressly allows the Commission to correct "improper rates" in appropriate circumstances. However, the plain language of S.C. Code Ann. § 58-5-290 unambiguously requires any such rate correction to be *prospective*:

> SECTION 58-5-290. Correction by Commission of improper rates and the like.
>
> Whenever the Commission shall find, after hearing, that the rates, fares, tolls, rentals, charges or classifications or any of them, however or whensoever they shall have theretofore been fixed or established, demanded, observed, charged or collected by any public utility for any service, product or commodity, or that the rules, regulations or practices, or any of them, affecting such rates, fares, tolls, rentals, charges or classifications, or any of them, are unjust, unreasonable, noncompensatory, inadequate, discriminatory or preferential or in any wise in violation of any provision of law, the Commission shall, subject to review by the courts, as herein provided, determine the just and reasonable fares, tolls, rentals, charges or classifications, rules, regulations or practices to *be thereafter observed* and enforced and shall fix them by order as herein provided.
>
> (Emphasis added).

The plain, clear, and unambiguous language of S.C. Code Ann. § 58-5-290 gives the Commission the authority to determine, after a hearing, that a previously "lawfully established" rate is "unlawful," and then adjust that rate going forward. The S.C. Supreme Court has confirmed that S.C. Code Ann. Section 58-5-290 grants the Commission in a water and wastewater rate case the authority only to "*prospectively* correct or reduce a previously-approved charge." *Porter*, 328 S.C. 222, 235, 493 S.E.2d 92, 99 (emphasis added); *See also SCE&G* ("The

Commission has no more authority to require a refund of monies collected under a lawful rate than it would have to determine that the rate previously fixed and approved was unreasonably low, and that the customers would thus pay the difference to the utility.").

D. The Commission is empowered to adjust rates going back when rates are found on appeal to be unlawful

There are instances (besides the process described in S.C. Code Ann. § 58-5-240(D)) where the Commission's adjustment of rates "looking back" following an appeal is not considered illegal "retroactive ratemaking." As cited by DIUC, *Hamm v. Central States Health and Life Co. of Omaha*, 299 S.C. 500, 386 S.E. 2d 250 ("*Central States*") holds that retroactive ratemaking does not occur when rates are "found to be unlawful." In *Central States*, the Court distinguished *SCE&G*:

> SCE&G (citation omitted) is easily distinguished from the present case. In SCE&G, we held that the PSC had no authority to direct refunds pursuant to past approved lawful rates. We reasoned that to have empowered the PSC to direct refunds in SCE&G, would have permitted them to engage in retroactive ratemaking. Under the present facts, the rates approved by the Commissioner were found to be *unlawful*. As such, a refund in this instance would not be considered retroactive ratemaking.

Central States, 299 S.C. 500, 504, 386 S.E.2d 250, 253. In *Central States*, the S.C. Insurance Commissioner granted insurer Central States a 9% rate increase for a particular policy. The S.C. Supreme Court ("Supreme Court") reversed a part of the Insurance Commissioner's order which allowed a rate increase as to medical intensity (found that rate increase "to be unlawful"), and remanded the case to calculate the appropriate rate to be charged. On remand, the Insurance Commissioner initially reduced the rate increase from 9% to 5.1% retroactively, but didn't order refunds.

The Supreme Court clarified that Central States had to refund those funds that were part of a rate that was "unlawfully established":

> That is, when a regulated company requests a rate increase which is approved by the regulating authority, but timely appealed and found to be unlawfully established, that company cannot keep funds to which it was never entitled. This is a matter of public policy and such reasoning would apply no matter what regulated industry is involved.

Central States, 299 S.C. 500, 506, 386 S.E.2d 250, 254. Because the Supreme Court determined that a 9% rate increase was "unlawful," and ordered the calculation of the lawful rate (5.1%), Central States had to refund the difference.

Those Supreme Court opinions that have found rates approved by the Commission "to be unlawful" or "unlawfully established" include a direction to the Commission to implement that determination on remand based on the existing record. An appellate decision concluding that rates approved by this Commission are "unlawful" necessarily involves a "determination on the merits," meaning a decision to be implemented by the Commission following remand. The remand *directs* the Commission to take a particular action, based on the existing record. Of course, the Supreme Court must direct the Commission to set rates. *Carolina Water Service, Inc. v. S.C. Pub. Serv. Comm'n*, 272 S.C. 81, 86, 248 S.E.2d 924, 926 (1978) ("The duty to fix a reasonable rate for a service performed by a public utility rests solely with the Commission, and neither the Court or the circuit court can assume this responsibility.")

For example, in *Hamm v. Southern Bell*, 305 S.C. 1, 4, 406 S.E. 2d 157, 159, (1991) ("*Southern Bell"*) the Supreme Court concluded that a "rate case increase was unlawful …" and remanded the case to the Commission to determine refunds and interest owed. Notably, because *Southern Bell* involved an appeal of the approval of a rate increase, the "unlawful rate" (the

increased rate) and the "lawful rate" (the previous rate) were known, and the Commission could (and was required by the Supreme Court to) calculate the difference between the two.

Similarly, the S.C. Supreme Court has determined that the Commission's inclusion of an account in rate base was error, and remanded with instructions for the Commission "to make the proper adjustments in consumer utility rates brought about by the deletion of the account from Company's rate base." *Parker v.* SCPSC, 285 S.C. 231, 234, 328 S.E.2d 909, 911 (1985) ("*Parker*"). And the Supreme Court determined that the Commission had improperly allowed fuel costs in Carolina Power & Light's base rate, and "remanded for entry of an order disallowing the additional fuel costs from the base rate. *Hamm v. SC Public Service Commission*, 291 S.C. 119, 123, 352 S.E.2d 476, 478 (1987) ("*Hamm*").

In each instance, (and consistent with the *Central States* holding), the Supreme Court determined the merits on appeal, and remanded the case directing the Commission to take certain actions. More specifically, the rates approved by the Commission were not "final" (because the Supreme Court determined those rates were "unlawful"), and the Commission's orders on appeal were not "final orders" regarding those rates (because the Supreme Court directed the Commission adjust rates on remand).

By contrast, in *SCE&G* the Supreme Court made no determination that a particular rate was "illegal" or "not lawfully established." The Commission initially ordered a seven plus million dollar refund to SCE&G's retail electric customers, reducing rates previously approved by the Commission. The S.C. Supreme Court reversed, ruling that the Commission's reduction of "past-approved rates" violated S.C. Code Ann. § 58-27-960 ("[N]o order for the payment of reparation on the grounds of unreasonableness must be made by the commission in any instance wherein the rate or charge in question has been authorized by law") and therefore

constituted "retroactive ratemaking." A "lawful rate" is a "final rate," and cannot be adjusted retroactively.

E. The Current Rates are "lawful" rates, and therefore "final rates," and cannot be adjusted retroactively

DIUC argues that the Current Rates "are not final rates and, as such, the requested modification of the issued rates [the Current Rates] are not retroactive ratemaking." DIUC Reply, p. 6. According to DIUC, "there has yet to be a *final* rate such that the concept of retroactive ratemaking would be implicated." DIUC Brief, p. 23. DIUC further cites as support language from the Settlement Agreement attached as Exhibit 1 (Paragraph 8(f)) to the Second Order on Remand- ("that this proceeding, Docket No. 2014-346-WS, will remain open until the issue of reparations is fully adjudicated, including any appeals and final order(s) on remand if necessary"). Likewise, DIUC argues that because this case "is an open proceeding, the data, evidence and information – as well as the rates to be ordered – are all subject to change in this docket." DIUC Reply, p. 6.

Contrary to DIUC's position, however, the Current Rates are "final," because the Second Order on Rehearing is a final order. No party challenged the Second Order on Rehearing within the time allowed for appeal. *Shirley's Iron Works, Inc. v. City of* Union, 403 S.C. 560, 734 S.E.2d 778 (2013) (an unappealed ruling is the law of the case). DIUC agrees: ("a Commission rate order is not final until all appeals are exhausted or the time to appeal has expired.") DIUC Reply, p. 6. Moreover, DIUC agrees that the Current Rates are "just and reasonable." Exhibit 1 to Second Order on Remand, paragraph 5. The Current Rates are "lawful rates," because they were approved by a Commission Order (the Order on Second Rehearing) that has not been

appealed. And, as set forth above, S.C. Code Ann. § 58-5-290 makes clear that the Current Rates could only be adjusted prospectively, and not retroactively.

Similarly, the proceedings currently taking place before the Commission are not an "open proceeding." The Order on Second Rehearing clarifies that "the Parties can *brief the matter* [DIUC's Request] to the Commission for its further determination in this case." Order on Second Rehearing, p. 5. Then via Order No. 2021-501 issued July 26, 2021, we struck certain portions of the Affidavit of John F. Guastella filed by DIUC because that affidavit was an "attempt to introduce other evidence into the case, including opinion evidence of the effect of the Commission's decisions on DIUC's rate of return on equity." Order No. 2021-501, Finding of Fact No. 3, p. 4.

Therefore, while DIUC may seek judicial review of this Order, the time to challenge the Order on Second Rehearing has passed. Likewise, agreeing to allow the parties to brief and argue whether or not reparations as requested by DIUC are legally appropriate (what we did) does not give the Commission the authority to make rates provisional and subject to revision going back. We will address the status of the Initially Approved Rates and the Subsequently Approved Rates below, but the proposition that the Current Rates are not "final rates" or this is an "open proceeding" where rates are subject to change has no basis in law and cannot support DIUC's argument that its Request does not constitute retroactive ratemaking.

F. The Initially Approved Rates and the Subsequently Approved Rates were "Lawfully Established" Rates and "Final Rates," and cannot be adjusted retroactively

In response to the limitations established by S.C. Code Ann. § 58-5-240(D), S.C. Code Ann. § 58-9-290, *Porter*, and *SCE&G*, DIUC argues, based on the rationale of *Central States*, that the Initially Approved Rates and the Subsequently Approved Rates were not "lawfully

established." DIUC Brief at p.22. DIUC argues that "when the Supreme Court determines upon timely appeal to reverse a Commission order, the rates permitted by that reversed order are still not 'final' since they will not be 'lawfully established' until changed on remand and any subsequent appeals have been ended by order." DIUC Reply, p. 6. DIUC further argues that *DIUC I's* overruling of *Parker* supports its Request because that ruling "requires the Commission on remand to apply a procedure that is based on the premise that the rate order appealed is not final; additional evidence can be provided as the parties are not bound by the previous record . . . . " DIUC Brief, pp. 22-23; DIUC Reply Brief, p. 6-7. According to DIUC the Subsequently Approved Rates are not "final" because these rates were not "lawfully established," and the Orders and Orders on Rehearing are not "final orders of the Commission." DIUC Reply Brief, p. 6.

DIUC's argument is incorrect as a matter of law, based upon the Supreme Court decisions issued in this case, the Commission proceedings on remand, and the law we discuss herein. The Supreme Court made no determination directing the Commission to take any action based on the existing record. Neither *DIUC I* nor *DIUC II* made any determination that the Initially Approved Rates or the Subsequently Approved Rates were "unlawful" or not "lawfully established." Nor did either Opinion make any determination that directed the Commission to implement the Proposed Rates (or the Current Rates). Neither Opinion directed the Commission to calculate or implement any particular rates.

The fact that DIUC prevailed in its two appeals to the Supreme Court does not establish or support the proposition either that 1) DIUC was entitled to its Proposed Rates on April 1, 2016 (or at any time); or 2) the Subsequently Approved Rates were "unlawful" or "improper" and therefore subject to adjustment retroactively. South Carolina law makes crystal clear those

rates approved by the Commission are lawful and appropriate and not subject to adjustment except as expressly authorized by statute. DIUC's citation to cases from other jurisdictions- for example *State ex rel Utilities Commission v. Conservation Council of North Carolina*, 312 N.C. 59, 320 S.E.2d 679 (1984),-have no application because those cases address different laws.

Neither Opinion of the S.C. Supreme Court made any "determination on the merits" that the Commission could implement on remand. Because the S.C. Supreme Court made no determination on the merits of the rate cases it heard on appeal, the remands to the Commission did not establish any of the law in this case, regarding rates or anything else. *See Falk v. Sadler*, 341 S.C. 281, 533 S.E.2d 350 (Ct. App. 2000) (when the appellate court makes no determination on the merits of the action, remand does not establish the law of the case). By contrast, in the *Southern Bell*, *Parker*, and *Hamm* cases, the S.C. Supreme Court's decisions and remand established "the law of the case," and directed the Commission to implement those determinations.

Instead of directing the Commission to implement particular determinations, the S.C. Supreme Court explicitly and unambiguously twice ordered the Commission to conduct *de novo* hearings on remand, making clear that the "determination on the merits" would be conducted by the Commission. "Therefore, we reverse and remand to the Commission for a de novo hearing." *DIUC I*, 420 S.C. 305, 320, 803 S.E.2d 280, 288, (2017). "We remand to the Commission for a new hearing." *DIUC II*, 427 S.C. 458, 464, 832 S.E.2d 572, 575, (2019) *DIUC II* clarified that *neither* opinion addressed the merits of *either* case: "In this reversal and remand, we do not address the merits at all. In reversing the commission twice, we do not intend to make any suggestion of our views of the merits." *Id.*

Because the Supreme Court made no determination that the Initially Approved Rates or the Subsequently Approved Rates were "unlawful," the Subsequently Approved Rates were "lawfully established," the "lawful rates," "final," and in effect until replaced by the Current Rates. Similarly, the Orders and Orders on Rehearing are "final orders" regarding rates, and particularly regarding any challenge of the Subsequently Approved Rates. *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 391 (2015) (stating that the filed rate doctrine prohibits collateral attacks on previously determined rates).

DIUC's attempts to distinguish *SCE&G* (DIUC Reply Brief, p. 11-13) fail simply because the Subsequently Approved Rates, like the rates addressed in *SCE&*G, were "lawfully approved." The rule in *SCE&G* (that the Commission has no authority to award refunds by adjusting a lawfully approved rate) applies with equal force here (the Commission has no authority to change "lawfully approved" rates and grant reparations based thereon). DIUC's Request seeks what the General Assembly has determined and the Supreme Court has ruled is unavailable to it. DIUC is asking the Commission to 1) determine that the Subsequently Approved rates, which were "previously fixed and approved" by the Commission, were unreasonably low and 2) require DIUC's customers to "pay the difference" plus interest to DIUC. DIUC's appeals and the S.C. Supreme Court decisions in *DIUC I* and *DIUC II* did not change the "lawful rates" (the Subsequently Approved Rates), so those rates cannot now be adjusted.

Absent a direction or determination that the Subsequently Approved Rates were unlawful, and a similar direction or determination that the Proposed Rates (or some other rates) were the "lawful rates," the Commission simply has no authority to make a rate adjustment going backward. *Porter; SCE&G; Central States. Central States* simply does not support

DIUC's request, because DIUC's claim that the Subsequently Approved Rates were "illegal" has no legal basis. S.C. Code Ann. § 58-5-290, *Porter*, and *SCE&G* foreclose any potential retroactive relief sought by the Request, and the rationale in *Central States* does not exist here. In addition, *DIUC I's* overturning of *Parker* alters none of the holdings of the above-cited cases, or the prospective effect of S.C. Code Ann. § 58-5-290.

G. Because the Orders, Orders on Rehearing, and Order on Second Remand are Final, DIUC's claims challenging the Subsequently Approved Rates are not properly before the Commission.

DIUC makes various claims regarding the Subsequently Approved Rates, For example, DIUC grounds its Request on its "constitutional right to collect rates that meet minimum constitutional standards of a reasonable return on investment." (DIUC Request, p. 13). DIUC argues that the Subsequently Approved Rates were "insufficient rates" (DIUC Brief, p. 14), were "constitutionally insufficient" (DIUC Brief, p. 16), and violated "DIUC's federal and state constitutional rights" (DIUC Brief, p. 17).

More particularly, DIUC argues that "the rates permitted in this case [the Subsequently Approved Rates] were constitutionally insufficient and, as such, the requested relief is necessary to remedy DIUC's federal and state constitutional rights." (DIUC Brief, p. 16-17). Citing a host of cases, DIUC argues that the Subsequently Approved Rates "have not provided DIUC its constitutionally guaranteed just compensation for its property issued and its operating expenses, given the duration of this rate proceeding." (DIUC Brief, p. 14), and that therefore the Subsequently Approved Rates were "confiscatory." (DIUC Brief, p. 13).

In addition, DIUC claims it "could not obtain further bonds" following the Orders on Rehearing. DIUC Brief, p. 19, and that "[w]ithout the requested relief, DIUC will have been denied constitutionally appropriate rates as well as the benefit of meaningful judicial review." DIUC Brief, p. 24. Finally, DIUC makes a variety of arguments regarding delay and the time that passed before the Commission's approval of the Current Rates. For example, DIUC argues about "being placed in an inferior position because of the extensive delays in obtaining a final, proper rate ruling." DIUC Reply, p. 1. DIUC further argues "ORS and the intervenors were able to extend this case by six years of costly litigation . . . ." DIUC Brief, p. 12.

Each of DIUC's arguments seeks to challenge the Subsequently Approved Rates. DIUC's attempts to challenge the Subsequently Approved Rates constitute an improper collateral attack on final orders of the Commission containing "lawfully approved" rates: the Orders, and the Orders on Rehearing. *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 391 (2015) (stating that the filed rate doctrine prohibits collateral attacks on previously determined rates).

Similarly, DIUC's request seeking to recover the difference between its Proposed Rates and the Subsequently Approved Rates plus interest for the period before the Orders on Rehearing is also unlawful (in addition to those reasons set out herein) because it is a collateral attack on Order 2018-68 and violates S.C. Code Ann. Section 58-5-240(D). DIUC implemented the process set out in S.C. Code Ann. Section 58-5240(D) following the issuance of the Orders: 1) DIUC put its Proposed Rates into effect under bond; 2) DIUC charged the Proposed Rates until the issuance of the Orders on Rehearing; and 3) DIUC refunded the difference between the Proposed Rates and the Subsequently Approved Rates (which were "lawfully approved" rates),

with appropriate interest. DIUC did not challenge that portion of Order No. 2018-68 requiring DIUC to provide the refunds and interest mandated by S.C. Code Ann. Section 58-5-240(D). Therefore, that portion of Order 2018-68 is "the law of the case," and DIUC cannot challenge that ruling now. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329-30, 730 S.E.2d 282, 285 (2012) ("An unappealed ruling, right or wrong, is the law of the case.") In fact, DIUC provided refunds and interest as required by Order 2018-68.

H. DIUC's Arguments With Respect to "Delay" and "Lost Revenue" Do Not Justify Relief.

DIUC makes a variety of arguments regarding delay and the time that passed before the Commission's approval of the Current Rates. For example, DIUC argues about "being placed in an inferior position because of the extensive delays in obtaining a final, proper rate ruling." DIUC Reply, p. 1. DIUC further argues that "ORS and the intervenors were able to extend this case by six years of costly litigation . . . ." DIUC Brief, p. 12. Specifically, DIUC argues that the "108.9% increase of Order No. 2021-132 [the Order on Second Remand] should have been in effect" from April 1, 2016 until March 1, 2021. DIUC Reply, pp. 1-2. Similarly, DIUC argues that its "original application sought just and reasonable rates." DIUC Brief, p. 11 Further, DIUC argues that the Proposed Rates were "the adequate rates," based on the similarity in revenues produced by the Proposed Rates and the Current Rates. DIUC Brief, p. 12, As a result, DIUC argues it "is entitled to recoup the lost revenues that it should have been able to collect . . . ." DIUC Brief, p. 13.

As set out above, even if those claims were accurate, the Commission does not have the authority to apply the Current Rates going backward as requested by DIUC. Similarly, those claims are barred as improper collateral attacks on the Subsequently Approved Rates.

However, we briefly address DIUC's allegations that "extensive delays" in the Commission's process put DIUC in an "inferior position."

Neither the Commission nor the S.C. Supreme Court ruled, before the Order on Second Remand, that DIUC was entitled to a 108.9% rate increase. Similarly, the Commission never ruled that the "original application sought just and reasonable rates," or concluded that the Proposed Rates were "just and reasonable." The S.C. Supreme Court did not direct the Commission to enter an order that would have implemented the Proposed Rates. The Subsequently Approved rates were "lawfully established," and remained in effect lawfully until the Commission approved the Current Rates. As a matter of law, there simply are no "lost revenues" that DIUC "should have been able to collect," because DIUC cannot show its entitlement to any other rates than those ordered by the Commission.

Any comparison of the revenue produced by the Proposed Rates and the Current Rates could not support the relief sought by DIUC. DIUC conflates "revenues" with "rates," (DIUC Brief at pgs. 11, 12, 17, 24, 25), overlooking that the Current Rates are "lawful rates" approved by the Commission, while the Proposed Rates have never been "lawfully established" by the Commission. There is no valid basis for the Commission to compare the putative revenues produced by Proposed Rates that were never "lawfully established" with revenues produced by the "lawfully established" Current Rates. Any similarity between the revenues hypothetically produced by the Proposed Rates, and those that would be produced by the Current Rates cannot change that 1) the Proposed Rates were never "lawfully established;" 2) the Subsequently Approved Rates were "lawfully established," and 3) the Current Rates were "lawfully established" prospectively as of March 1, 2021.

And any such comparison is invalid because the Current Rates are the product of different assets and expenses (including expenses that changed over time) than what DIUC used to calculate its Proposed Rates. DIUC is correct that its Application sought total operating revenues of $2,267,721 (Application Schedule A-4, Pro Forma Proposed Rates, Total Revenues), and the Order on Second Rehearing approved total operating revenues of $2,267,714 (Order on Second Rehearing, Exhibit One, "Operating Statement- Water and Wastewater Combined"). However, the expenses and assets for which DIUC initially sought approval in its Application (the basis for the Proposed Rates) are different than those approved by the Commission in the Order on Second Rehearing (the basis for the Current Rates):

	Application	**Order on Second Rehearing**
Total O&M Expense	$866,936	$1,005,801
Total Operating Expenses	$1,649,127	$1,827,517
Net Operating Income	$618,595	$440,197
Rate Base	$7,085,475	$5,900,924
Rate of Return	8.73%	7.46%

The Order on Second Rehearing approved a rate base ($5,900,924) that was substantially less than the ($7,085,475 sought by DIUC in its Application. The reason these inputs changed is because two additional *de novo* hearings took place, where additional evidence was presented.

The Commission could not establish rates based solely on a comparison of revenues (going backward or otherwise) because doing so is completely the opposite of a proper ratemaking process that requires a demonstration of assets and expenses as a necessary *precursor* to the calculation of appropriate rates and the revenues they would produce. An order

In addition, our Orders demonstrate that DIUC's claim for "lost revenues that it should have been able to collect" does not accurately describe what took place over the course of this Docket. For example, although *DIUC I* did not "direct" the Commission to enter an order making adjustments to the existing record, the Orders on Rehearing gave DIUC the benefit of those assets and expenses (the Elevated Tank Site, Property Taxes, and Bad Debt Expense) that were included in *DIUC I's* "guidance to the Commission." In the First Order on Rehearing, "the water tank, pipes, and other utility equipment located on the Elevated Tank Site" were added to DIUC's rate base and included in the calculation of the Subsequently Approved Rates. Order. No. 2018-68, p. 21. Likewise, in the wake of *DIUC I's* "guidance" regarding Property Taxes, the Commission approved "property taxes of $526,848 amortized over eight (8) years for an annual amortization of property taxes of $65,856," and 2015 property taxes of $188,092. Order No. 2018-68, p. 30. DIUC agreed with these adjustments, and these amounts were included in the calculation of the Subsequently Approved Rates. Finally, the Commission approved a "total bad debts expense" of $198,690 (Order 2018-68, p. 41), even though the DIUC I "guidance" referenced to the bad debts expense sought in DIUC's application as $105,667, and that ORS originally "calculated DIUC's bad debt at $108,349 . . . . The "bad debts expense" of $198,690 was included in the calculation of the Subsequently Approved Rates.

Because DIUC put its Proposed Rates into effect under bond, and the Orders on Rehearing included the Elevated Storage Tank in rate base and approved Property Tax expenses and Bad Debts Expense as advocated by DIUC, DIUC received the benefit of those assets and expenses beginning April 1, 2016. These assets and expenses were included in the calculation of the Subsequently Approved Rates in effect from April 1, 2016 until March 1, 2021 (the effective

date of the Current Rates). Significantly, (and contrary to its claims in its Brief and Reply Brief), DIUC collected all "revenues that it should have been able to collect" with respect to those assets and expenses.

Similarly, the fact that DIUC litigated this case and presented new evidence following its appeals for its actual or potential benefit undercuts its argument that any party "cost DIUC six years of legal and consulting fees and lost return" or that any party was "able to extend this case."(DIUC Brief at p. 12). First, the S.C. Supreme Court "extended this case" by remand to the Commission on two occasions for *de novo* hearings, the Commission followed the Court's mandates, and the parties participated consistent with the nature of those *de novo* hearings. Following the process mandated by the S.C. Supreme Court and participating in two contested cases provides no legal basis to adjust rates (prospectively or otherwise), and DIUC provides us with no authority to support that claim.

Second, the "extension of the case" allowed DIUC to submit additional expenses supporting its rate case, and to recover additional expenses as part of the Current Rates. *The Current Rates reflect additional expenses not part of DIUC's original Application.* As we noted in Order 2018-68, (at Page 36, n. 33) "DIUC introduced new evidence that altered its original Rate Case expense request." Order 2018-68 also approved recovery of $60,781.56 in expenses associated with those premiums for the appeal bond securing its Proposed Rates, and other additional rate case expenses.

Moreover, the Order on Second Rehearing approved "$542,978 for Guastella Associates' ("GA") rate case expenses incurred by DIUC through September 30, 2017, and supplemental legal rate case expenses of $95,430 . . ." over and above the $272,382 in rate case expenses approved in the Orders on Rehearing. (Order on Second Rehearing, p. 4). In addition, as recited

in the Order on Second Rehearing, DIUC has additional rate case expenses incurred in this proceeding, for which it will seek recovery in its next rate filing. (Order on Second Rehearing, p. 4). The Current Rates reflect DIUC's "legal and consulting fees" that have changed since its initial Application, and DIUC may seek additional incurred expenses in a future rate case. Finally, DIUC unsuccessfully advocated throughout this case for the inclusion of $699,631 in plant-in-service assets to its rate base. DIUC cannot actively litigate for its own actual and potential benefit but fault other parties for doing the same.

I. The General Principles that Prohibit Retroactive Ratemaking Apply in this Case

Finally, the prospect that a current ratepayer could be responsible for additional charges applicable to a rate for service provided in the past (the effect of granting the Request) underscores the express statutory policy prohibiting retroactive ratemaking applied in South Carolina. *Porter*, 328 S.C. 222, 231 493 S.E.2d 92, 97 ("Retroactive rate-making is prohibited based on the general principle that those customers who use the service provided by the utility should pay for its production rather than requiring future rate payers to pay for its past use."). If we granted the Request, customers would pay a "rate" for services (over and above what those customers have already paid for those services) that was based in part on expenses that DIUC had not even incurred as of the date of service. DIUC argues (Reply Brief, p. 7-8), that because "[o]nly the customers who actually received water and wastewater services from October 1, 2017 until March 1, 2021, at the lower confiscatory rates will be billed for the difference" that principle does not apply.

DIUC misunderstands the policy concern that drives the statutory prohibitions on retroactive ratemaking. DIUC has no right to charge any rates to a person who does not "actually receive[] water and wastewater service" during a particular time period. However, a current

customer of DIUC who was also a customer during the time period covered by the Request would pay not only for 1) the "production" of water and wastewater service (by paying the Current Rates effective March 1, 2021 for services received on and after that date), but also 2) her "past use" (paying the Current Rates effective April 1, 2016). Aside from the numerous legal provisions prohibiting this illegal "retroactive ratemaking," granting the Request would be grossly unfair to customers of DIUC.

ORDERING PARAGRAPHS

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. DIUC's Request for Reparations is hereby denied, based upon the conclusions of law set forth above.

2. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

_____
Justin T. Williams, Chairman

ATTEST:

_____
Jocelyn Boyd, Chief Clerk